

U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)



Issue Date: 30 April 2003

Case No.: 2002-LHC-1876

OWCP No.: 07-146894

In the Matter of:

**TRACY CUEVAS,
Claimant**

v.

**AVONDALE INDUSTRIES, INC.,
Employer**

APPEARANCES:

**WOODROW W. PRINGLE, III, ESQ.,
On Behalf of the Claimant**

**DONALD P. MOORE, ESQ.,
On Behalf of the Employer**

**BEFORE: RICHARD D. MILLS
Administrative Law Judge**

**DECISION AND ORDER – GRANTING SECTION 22
MODIFICATION**

This proceeding involves a Section 22 Motion for Modification under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., ("the Act" or "LHWCA"). The claim was filed by Tracy Cuevas, Claimant, against Avondale Industries, Inc. ("Avondale") for injuries he sustained on December 30, 1997 during the construction of a vessel.

The Court found in our original decision that Mr. Cuevas suffered work-related shoulder, neck, and lower back injuries and was entitled to continuing temporary total disability compensation beginning January 6, 1997, based on an average weekly wage of \$429.02. See Cuevas v. Avondale Industries, Inc., Case No. 2000-LHC-638 (January 22, 2001, ALJ Mills); JX-1. The Court also found that Mr. Cuevas was entitled to reasonable and necessary medical benefits for his work-related injuries, pursuant to § 7 of the Act. See Id.

On March 25, 2002, Avondale filed a Motion for Modification of Order, asserting that there has been a change in condition with respect to the nature and extent of Mr. Cuevas' disability. Avondale asserts that Mr. Cuevas' condition has reached permanency and that he is now only partially disabled. A hearing was held on November 19, 2002 in Gulfport, Mississippi, at which time the parties were given the opportunity to offer testimony, documentary evidence, and to make oral argument. The following exhibits were received into evidence:

- 1) Joint Exhibit No. 1;
- 2) Claimant's Exhibits Nos. 1-2; and
- 3) Respondent's Exhibits Nos. 1-4.

This decision is being rendered after giving full consideration to the entire record.¹

STIPULATION²

The Court finds sufficient evidence to support the following stipulation:

- 1) Claimant's disability reached maximum medical improvement on November 7, 2001.

¹ The following abbreviations will be used in citations to the record: JX - Joint Exhibit, CX - Claimant's Exhibit, RX - Employer's Exhibit, and TR - Transcript of the Proceedings.

² TR. 10.

ISSUES

The unresolved issues in these proceedings are:

- (1) Nature and Extent of Disability; and
- (2) Attorney's Fees.

SUMMARY OF THE EVIDENCE

I. TESTIMONY

Tracy Cuevas

Mr. Cuevas testified that he underwent a Functional Capacity Evaluation ("FCE") in November 2001 which indicated that he could work at least light to medium work. TR. 13. Mr. Cuevas testified that he subsequently met with Tommy Sanders, a vocational counselor, who identified for Mr. Cuevas available jobs.³ TR. 14. Mr. Cuevas testified that the first jobs he applied for were the jobs recommended by Mr. Sanders. TR. 14. In addition to the three jobs identified by Mr. Sanders, Mr. Cuevas had a list of seventeen other employers that were contacted by him or his wife. TR. 16-18. Mr. Cuevas testified that he has submitted a total of eleven written applications since his medical release. TR. 19. Mr. Cuevas submitted written applications to the three employers identified by Mr. Sanders and to eight of the other seventeen employers. TR. 18-19, 49-50. Mr. Cuevas testified that for some of the jobs in which an application was filled out, his wife filled out the application while he was sitting beside her. TR. 27. Mr. Cuevas testified that he could read and write. TR. 27, 56.

Including the eight employers to whom he submitted a written application, Mr. Cuevas spoke with ten of the seventeen employers on his list. TR. 50. Mr. Cuevas testified that the other seven employers were listed because his wife had called them on the phone to ask if they were hiring. TR. 51. Mr. Cuevas testified that he sat beside his wife while she made these calls and explained that his wife made the calls because he does not like to talk much. TR. 51. Mr. Cuevas testified that half of the employers on his list were called out of the blue, without knowing whether they were hiring or not. TR. 60. Mr. Cuevas also indicated that he would visit employers in person without knowing whether they were hiring or not. TR. 60.

³ According to Mr. Sanders' reports, he first met with Mr. Cuevas on January 29, 2002. RX-2, p. 1. In a February 5, 2002 letter to Mr. Cuevas, Mr. Sanders identified for him three suitable available jobs: a cashier's position at Swifty Serve, customer service representative positions at Republic Parking, and security guard positions at Professional Security. RX-2, pp. 1-2.

Mr. Cuevas testified that he generally went to the employment office at least once every two weeks, where he would look up job openings. TR. 51-52. For each visit to the employment office, Mr. Cuevas was allowed to examine the details of three openings of his choosing. TR. 51-52. According to Mr. Cuevas, he did not bother putting in applications to these leads because they required many years of experience and he did not feel that he was qualified. TR. 52-53. Mr. Cuevas believed that of the leads from the employment office, a position as a butcher was the only job he could have attained. TR. 53. However, Mr. Cuevas testified that he did not feel that he could sit and slice meat all day because of his back and shoulder problems. TR. 53. Mr. Cuevas testified that he has also looked in the classified ads, but that his list of seventeen employers did not contain any leads from the classifieds. TR. 60.

Mr. Cuevas testified that he reported his prior work injury on applications that requested such information. TR. 27. Mr. Cuevas also testified that he reported to employers, including Professional Security, that he was on medication and could not work at night. TR. 28, 56. Mr. Cuevas opined that when he takes his medication at night he is not capable of working. TR. 57. Mr. Cuevas did not recall telling Republic Parking that he had to lay down from time to time. TR. 56.

Mr. Cuevas recalled that Mr. Sanders had recommended he obtain a GED, but Mr. Cuevas testified that he has not gotten a GED. TR. 29-30, 55-56. Mr. Cuevas indicated that there was no particular reason why he has not obtained a GED. TR. 56. When asked if he felt like he has done everything he could to obtain work, Mr. Cuevas indicated that he probably could have done more and put in more applications. TR. 52-53, 61. Mr. Cuevas explained that he did not feel like his job search was doing any good. TR. 53.

Mr. Cuevas testified that his physical problems were getting worse. TR. 44. He testified that he has pain at the center of his neck and shoulder and that there's a shooting pain at the middle of his waist line. TR. 45. Mr. Cuevas testified that this pain comes and goes, depending on his positioning. TR. 45. Mr. Cuevas testified that he also has pain in the center of his left shoulder which causes a sharp pain every time he raises his arm or makes a fast move. TR. 47. He also indicated that he had a throbbing neck pain in the center of his neck on the left side. TR. 48.

Mr. Cuevas testified that he can stand for only 15 to 20 minutes at a time before having to sit down. TR. 48. Mr. Cuevas testified that he can stand longer when walking around, but he indicated that he could do so only for a limited time before having to sit down. TR. 44, 49. Mr. Cuevas also testified that although he could bend over, he experiences pain and dizziness when standing back up. TR. 44, 54. Mr. Cuevas testified that he is not capable of bending over and picking something up and that he can only lift groceries if they are very light. TR. 54-55. Mr. Cuevas also indicated that he drives once in a while but must twist and stretch at stops when he is in a car for a prolonged period of

time. TR. 55. According to Mr. Cuevas, he generally sleeps only two to four hours a night because he cannot get comfortable in bed. TR. 44, 57-58. Mr. Cuevas testified that his normal routine included walking in his yard, standing around and looking in his pond, and riding around to places. TR. 52.

Mr. Cuevas testified that he has not seen Dr. Bazzone since his release one year ago. TR. 18. Mr. Cuevas testified that he tried to go back to Dr. Bazzone in the last year but was told by Dr. Bazzone that he would have to obtain workers' compensation approval beforehand. TR. 46. Mr. Cuevas testified that neither he nor his attorney had written to Avondale to request an authorization to see Dr. Bazzone. TR. 59. Mr. Cuevas also did not request to see another doctor. TR. 59. Mr. Cuevas did not know whether Dr. Bazzone's office had called Avondale to ask for authorization. TR. 59. Mr. Cuevas testified that Dr. Bazzone indicated he had reached maximum medical improvement on November 7, 2001. TR. 13.

II. MEDICAL EVIDENCE: Reports

Victor T. Bazzone

Dr. Bazzone indicated on November 7, 2001 that Mr. Cuevas was at maximum medical improvement. RX-1, pp. 5-6. Dr. Bazzone also suggested that an FCE be performed on Mr. Cuevas. RX-1, p. 5.

Physical Therapy Center of Ocean Springs

Mr. Cuevas underwent an FCE on November 26, 2001. RX-1, p. 10. The report indicates that Mr. Cuevas' true maximum functional abilities could not accurately be assessed due to self-limiting behaviors throughout the two-day FCE. RX-1, pp. 10-14. The report indicated that Mr. Cuevas was capable to work in the light/medium category and was capable of lifting/carrying a maximum of 35 pounds occasionally with frequent lifting and/or carrying of objects weighing up to 15 pounds. RX-1, p. 10.

III. VOCATIONAL EVIDENCE: Testimony and Reports

Tommy Sanders

Mr. Sanders met with Mr. Cuevas on January 29, 2002. RX-2, p. 1. Mr. Sanders testified that during the meeting, he learned about Mr. Cuevas' age, education, employment history, vocational interests, and attempts to find work. TR. 32. Mr. Sanders had also reviewed Mr. Cuevas' medical records prior to the meeting. TR. 32. Noting that Mr. Cuevas' FCE indicated he could perform light/medium work, Mr. Sanders explained that light work is defined as lifting 20 pounds occasionally and medium work is defined as lifting

50 pounds occasionally. TR. 32-33. Mr. Sanders testified that Mr. Cuevas fell between those two categories with an ability to lift 35 pounds. TR. 33.

Mr. Sanders performed a job market survey regarding Mr. Cuevas in early February 2002. TR. 33; RX-2, pp. 1-2. Mr. Sanders testified that he took into account Mr. Cuevas' medical records and the information he learned from his meeting with Mr. Cuevas, including Mr. Cuevas' age, education, background, and physical abilities. TR. 33. Mr. Sanders testified that Mr. Cuevas did not have significant transferable skills, and the job market search was accordingly limited to unskilled and lower level entry jobs. TR. 33. In a report on February 5, 2002, Mr. Sanders identified three potential light duty jobs for Mr. Cuevas. TR. 33-34; RX-2, p. 1.

The first job was a cashier at Swifty Serve for 24 to 38 hours per week at a rate of \$5.75. TR. 34; RX-2, p. 1. Mr. Sanders indicated that employees would undergo a 24 hour training period and would be eligible for wage increases after 90 days of employment. RX-2, p. 1. The primary duties of the job were to greet customers, operate a cash register and credit card machine, accept payment, and complete a shift report. RX-2, p. 1. According to Mr. Sanders' report, the employee would also have cleaning duties once per shift, including sweeping, mopping, cleaning rest rooms, emptying trash, and picking up in the parking lot. RX-2, p. 1. The employee will also be responsible for re-stocking coolers, straightening shelves, and making coffee. RX-2, p. 1. The report indicates that a stool is available for alternate sitting, standing, and walking. RX-2, p. 1. The position entailed lifting of 18 pounds occasionally, occasional pushing and pulling of eight pounds, occasional sitting, bending, and stooping, and frequent standing, walking, and handling. TR. 34; RX-2, p. 1.

Second, Mr. Sanders identified two customer service representative positions at Republic Parking, which services the Biloxi-Gulfport International Airport. RX-2, p. 1. The positions were 40 hours per week with entry wages of \$6.00 per hour. RX-2, p. 1. The first job consisted of sitting or standing at a podium to direct passengers to cabs or limousines. RX-2, p. 1. The other job entailed working at a guard station to maintain a log book regarding how many people boarded various modes of transportation. RX-2, p. 2. The jobs provided training and required alternate sitting, standing, and walking as well as occasional lifting of two pounds. RX-2, p. 2.

Third, Mr. Sanders identified a security guard position at Professional Security, for work at William Carey College. RX-2, p. 2. Mr. Sanders indicated that the position was for 40 hours per week, with training provided, and entry wages of \$6.25 per hour. RX-2, p. 2. The employee primarily was to ride around the campus in a golf cart, making five to ten minute rounds each hour and checking buildings and doors. RX-2, p. 2. According to Mr. Sanders' report, the remaining time could be spent at the guard station with the latitude to alternately sit, stand, and walk. RX-2, p. 2. The job also entailed lifting and carrying

occasionally of five pounds, occasional standing and walking, and frequent sitting. RX-2, p. 2.

Mr. Sanders testified that he performed another labor market survey in late September and early October 2002 and identified for Mr. Cuevas three additional available jobs. TR. 35; RX-2, p. 10. According to Mr. Sanders, the jobs he identified in his first and second reports were suitable to Mr. Cuevas based on Mr. Cuevas' physical and mental capabilities. TR. 38. In an October 4, 2002 report, Mr. Sanders first identified full and part time openings for parking lot attendants with Copa Casino. TR. 34-35; RX-2, p. 10. These positions provided training and paid \$6.50 to \$7.50 per hour. TR. 35; RX-2, p. 10. The positions primarily entailed driving a golf cart-like shuttle around casino property to pick up and deliver guests to and from the parking lot. TR. 34-35; RX-2, p. 10. According to Mr. Sanders' report, these positions allowed latitude to stop and walk around when it was not busy. RX-2, p. 10.

Second, Mr. Sanders indicated that Munro Petroleum had two cashier openings for 36 hours per week at a rate of \$6.50 per hour. TR. 35; RX-2, p. 10. The primary responsibilities were to operate the cash register and credit card machine, complete shift reports, and maintain the snack and coffee areas. RX-2, p. 10. There were no stocking duties, and some of the stores had stools, allowing for intermittent sitting. RX-2, p. 10. The jobs entailed occasional lifting of five to ten pounds, occasional bending, stooping, and sitting, and frequent standing, walking, and handling. RX-2, p. 10.

Third, Mr. Sanders indicated that Imperial Palace had two 40-hour per week openings for casino porters at a rate of \$7.50 per hour, with training provided. TR. 35; RX-2, p. 11. The duties were dusting slot machines and adjacent areas, emptying and wiping ashtrays, picking up containers, and using a hand held sweeper. RX-2, p. 11. Mr. Sanders indicated that additional responsibilities may include sweeping and mopping restrooms, emptying trash cans, and keeping stock on hand. RX-2, p. 11. The job entailed occasional lifting of ten pounds as well as pushing and pulling of five pounds. Also, the job required bending/stooping with lifting and carrying of three to five pounds frequently and two pounds constantly, as well as frequent or constant standing/walking. RX-2, p. 11.

Mr. Sanders attempted to follow up with the three employers identified in his February 5, 2002 report. TR. 36; RX-2, p. 8. Mr. Sanders was not able to obtain any information concerning the Swifty Serve position, but he did speak with Republic Parking and Professional Security. TR. 36; RX-2, p. 8. With respect to Republic Parking, Mr. Sanders learned that Mr. Cuevas had indicated that he could not sit or stand for long periods of time and that he had to lie down from time to time. TR. 36; RX-2, p. 8. Mr. Sanders testified that Mr. Cuevas' medical record did not contain any such restrictions and that Mr. Cuevas' FCE indicated that he could sit and stand frequently, meaning two-thirds of a work day according to the Department of Labor. TR. 36-37. According to Mr. Sanders' April

29, 2002 report, Mr. Cuevas also indicated to Republic Parking that he was advised by his attorney to apply for the position. RX-2, p. 8. In addition, Mr. Sanders reported that the application for Republic Parking was filled out by Mrs. Cuevas. TR. 37.

Mr. Sanders testified that Mr. Cuevas had indicated to Professional Security that he had been injured on the job, that he had good and bad days, and that it would be difficult for him to work nights due to the medication he was taking. TR. 37; RX-2, p. 8. According to Mr. Sanders, Professional Security indicated that Mr. Cuevas was not hired due to his availability issues. TR. 37; RX-2, p. 8. Mr. Sanders testified that Mr. Cuevas' FCE did not contain any restrictions against working at night. TR. 37. In addition, Mr. Sanders' April 29, 2002 report indicates that Mr. Cuevas did not complete the space for phone number and address of former employers nor the reference section of his application to Professional Security. RX-2, p. 8.

Mr. Sanders opined that Mr. Cuevas had not conducted a diligent job search. TR. 38; RX-2, p. 9. Mr. Sanders explained that Mr. Cuevas' job search was not consistent and sustained, as evidenced by the fact that Mr. Cuevas had only applied for 20 jobs over an 11 month period. TR. 38. Mr. Sanders opined that someone who wanted to go back to work would make finding employment an eight hour a day job. TR. 38. Mr. Sanders also testified that one normally does not bring another person on job interviews and that one routinely fills out one's own applications. TR. 39. Mr. Sanders also reasoned that one should not reveal a work injury unless necessary and that one should go into detail about prior work experience. TR. 39-40.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are based upon the Court's observations of the credibility of the witnesses, and upon an analysis of the medical records, applicable regulations, statutes, case law, and arguments of the parties. As the trier of fact, this Court may accept or reject all or any part of the evidence, including that of expert medical witnesses, and rely on its own judgment to resolve factual disputes and conflicts in the evidence. See Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). In evaluating the evidence and reaching a decision, this Court applies the principle, enunciated in Director, OWCP v. Greenwich Collieries, 114 S.Ct. 2251 (1994), that the burden of persuasion is with the proponent of the rule. The "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, will not be applied, because it violates § 556(d) of the Administrative Procedure Act. See Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 281, 114 S.Ct. 2251, 2259, 129 L.Ed. 2d 221 (1994).

NATURE AND EXTENT OF DISABILITY

Disability under the Act means, “incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment.” 33 U.S.C. § 902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to have no loss of wage earning capacity, a total loss, or a partial loss. The burden of proving the nature and extent of disability rests with the claimant. Trask v. Lockheed Shipbuilding Constr. Co., 17 BRBS 56, 59 (1980).

The nature of a disability can be either permanent or temporary. A disability classified as permanent is one that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. SGS Control Servs. v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant’s disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, 17 BRBS at 60. Any disability suffered by the claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231 (1984); SGS Control Servs., 86 F.3d at 443.

The date of maximum medical improvement is the traditional method of determining whether a disability is permanent or temporary in nature. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235 n.5, (1985); Trask, 17 BRBS at 60; Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). The date of maximum medical improvement is the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. This date is primarily a medical determination. Manson v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). It is also a question of fact that is based upon the medical evidence of record, regardless of economic or vocational consideration. Louisiana Ins. Guar. Ass’n. v. Abbott, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamic Corp., 10 BRBS 915 (1979).

In this case, the parties have stipulated that Mr. Cuevas’ December 30, 1997 work-related injuries reached maximum medical improvement on November 7, 2001. TR. 10. This stipulation is supported by the evidence and is accepted by the Court. RX-1, pp. 5-6. Therefore, the Court finds that Mr. Cuevas’ December 30, 1997 work-injuries became permanent on November 7, 2001.

The extent of disability can be either partial or total. To establish a *prima facie* case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work related injury. See Manigault v. Stevens Shipping Co., 22

BRBS 332 (1989); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988). Total disability becomes partial on the earliest date that the employer establishes suitable alternative employment. Rinaldi v. General Shipbuilding Co., 25 BRBS 128 (1991). To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59 (3d Cir. 1979). For the job opportunities to be realistic, however, the employer must establish their precise nature, terms, and availability. Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94, 97 (1988). A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989).

In this case, the Court finds that a *prima facie* case of total disability has been established. In our original decision, the Court found that Mr. Cuevas was totally disabled. See Cuevas v. Avondale Industries, Inc., Case No. 2000-LHC-638 (January 22, 2001, ALJ Mills); JX-1. In seeking a § 22 Modification, Avondale does not assert that Mr. Cuevas is now able to perform his usual employment as a shipfitter, and such an assertion would be without merit based on the medical evidence in this case. According to Mr. Cuevas' FCE on November 26, 2001, he is capable of performing work only in the light to medium category. Therefore, the Court finds that Mr. Cuevas is not capable of returning to his usual employment at Avondale as a shipfitter.

The Court further finds that Avondale has established the existence of suitable alternative employment in this case. In his February 5, 2002 and October 4, 2002 reports, Mr. Sanders identified six available positions suited to Mr. Cuevas based on Mr. Cuevas' physical and mental capacities, including his age, education, background, and physical abilities. TR. 33, 38. The Court finds that Mr. Cuevas was capable of performing and could have obtained these jobs had he diligently tried. The first position was a cashier at Swifty Serve for 24 to 38 hours per week at a rate of \$5.75. TR. 34; RX-2, p. 1. The primary duties of the job were to greet customers, operate a cash register and credit card machine, accept payments, and complete shift reports. RX-2, p. 1. The position also called for restocking coolers, straightening shelves, making coffee, and cleaning duties such as sweeping, mopping, cleaning rest rooms, emptying trash, and picking up in the parking lot. RX-2, p. 1. A stool was available for alternate sitting, standing, and walking, and the position entailed lifting of 18 pounds occasionally, occasional pushing and pulling of eight pounds, occasional sitting, bending, and stooping, and frequent standing, walking, and handling. TR. 34; RX-2, p. 1. According to Mr. Cuevas' FCE, he is capable of occasional lifting and carrying of 20 to 40 pounds and occasionally pushing and pulling of 120 and 160 pounds respectively. RX-1, p. 11. Mr. Cuevas is also capable of frequent standing and walking and continuous sitting and manual dexterity. RX-1, p. 11. Therefore, the Court finds that the Swifty Serve cashier

position falls within Mr. Cuevas' work restrictions and that the Swifty Serve position constitutes suitable alternative employment in this case. See RX-1, pp. 10-14.

The next positions identified by Mr. Sanders were two customer service representative positions at Republic Parking, for work at the Biloxi-Gulfport International Airport. RX-2, p. 1. The positions were for 40 hours per week with entry wages of \$6.00 per hour. RX-2, p. 1. The first job consisted of sitting or standing at a podium to direct passengers to cabs or limousines. RX-2, p. 1. The other job entailed working at a guard station to maintain a log book regarding how many people boarded various modes of transportation. RX-2, p. 2. The jobs provided training and required alternate sitting, standing, and walking as well as occasional lifting of two pounds. RX-2, p. 2. As with the Swifty Serve position, the Court finds that Mr. Cuevas is capable of performing these jobs based on the work restrictions indicated in his FCE. RX-1, pp. 10-14.

Mr. Sanders next identified a security guard position at Professional Security, for work at William Carey College. RX-2, p. 2. Mr. Sanders indicated that the position was for 40 hours per week, with training provided and entry wages of \$6.25 per hour. RX-2, p. 2. The employee primarily was to ride around the campus in a golf cart, making five to ten minute rounds each hour and checking buildings and doors. RX-2, p. 2. Mr. Sanders indicated that the remaining time could be spent at the guard station with the latitude to alternately sit, stand, and walk. RX-2, p. 2. The job also entailed lifting and carrying occasionally of five pounds, occasional standing and walking, and frequent sitting. RX-2, p. 2. These duties fall within Mr. Cuevas' work restrictions, and the Court finds that the Professional Security position also constitutes suitable alternative employment.

In his October 4, 2002 report, Mr. Sanders identified three additional available jobs. TR. 35; RX-2, p. 10. First, Mr. Sanders identified full and part time openings, of 20 hours and 40 hours, for parking lot attendants with Copa Casino. TR. 34-35; RX-2, p. 10. These positions provided training and paid \$6.50 to \$7.50 per hour. TR. 35; RX-2, p. 10. The primary duties were to drive a golf cart-like shuttle around casino property to pick up and deliver guests to and from the parking lot. TR. 34-35; RX-2, p. 10. The positions allowed latitude to stop and walk around when it was not busy. RX-2, p. 10. Second, Mr. Sanders indicated that Munro Petroleum had two cashier openings for 36 hours per week at a rate of \$6.50 per hour. TR. 35; RX-2, p. 10. The primary responsibilities were to operate the cash register and credit card machine, complete shift reports, and maintain the snack and coffee areas. RX-2, p. 10. There were no stocking duties, and some of the stores had stools, allowing for intermittent sitting. RX-2, p. 10. The jobs entailed occasional lifting of five to ten pounds, occasional bending, stooping, and sitting, and frequent standing, walking, and handling. RX-2, p. 10. Third, Mr. Sanders indicated that Imperial Palace had two 40-hour per week openings for casino porters at a rate of \$7.50 per hour, with training provided. TR. 35; RX-2, p. 11. The job entailed dusting slot machines and adjacent areas, emptying and wiping ashtrays, picking up containers, and using a hand held sweeper. RX-2, p. 11.

Additional possible responsibilities included sweeping and mopping restrooms, emptying trash cans, and keeping stock on hand. RX-2, p. 11. The job required occasional lifting of ten pounds as well as pushing and pulling of five pounds. RX-2, p. 11. The job also required bending/stooping with lifting and carrying of three to five pounds frequently and two pounds constantly, as well as frequent or constant standing/walking. RX-2, p. 11. Based on Mr. Cuevas' FCE, the Court finds that these three jobs fall within Mr. Cuevas' work restrictions. Likewise, the Court finds that Mr. Cuevas is sufficiently skilled mentally and physically to perform all six jobs described above.

The Court notes that Mr. Cuevas did testify that his physical problems had gotten worse. TR. 44. He testified that he has neck, shoulder, and back pain and that he can only stand and walk for a limited time before having to sit down. TR. 45, 47-49. Mr. Cuevas also testified that he could bend over but experiences pain and dizziness when standing back up and that he is not capable of picking something up while bending over. TR. 44, 54. However, the Court's assessment regarding suitable alternative employment is not changed by Mr. Cuevas' testimony. First, Mr. Cuevas' description of his physical limitations does not comport with the findings of his FCE. Second, Mr. Cuevas did not present any medical evidence in support of his testimony. Third, despite a supposed worsening of his medical problems that has substantially limited him, Mr. Cuevas did not consult a doctor to address the asserted change in his physical status. Although Mr. Cuevas testified that he tried to go back to Dr. Bazzone in the last year and was told that workers' compensation approval was required beforehand, neither Mr. Cuevas nor his attorney wrote to Avondale to request an authorization to see Dr. Bazzone. TR. 45-46, 59. Mr. Cuevas also did not request to see another doctor. TR. 59. In short, Mr. Cuevas' testimony regarding the worsening of his physical condition is not supported by any medical evidence and is insufficient to refute the findings of his FCE. Based on the foregoing, the Court finds that the six jobs described above constitute suitable alternative employment in this case.

CLAIMANT'S DILIGENCE AND WILLINGNESS TO WORK

Having outlined potential jobs that were available to Mr. Cuevas, the Court will now evaluate his diligence and willingness to work. If the employer meets its burden and shows suitable alternative employment, the burden shifts back to the claimant to prove a diligent search and willingness to work. See Williams v. Halter Marine Serv., 19 BRBS 248 (1987). If the employee does not prove this, then at the most, his disability is partial and not total. See 33 U.S.C. § 908(c); Southern v. Farmers Export Co., 17 BRBS 64 (1985).

The Court finds that Mr. Cuevas has not demonstrated diligence and a willingness to work in his job search. Mr. Cuevas testified that since his FCE in November 2001, he has applied for a total of twenty jobs, the three jobs originally identified by Mr. Sanders and seventeen other employers that were contacted by him or his wife. TR. 16-18; CX-2. Of those twenty jobs, Mr. Cuevas testified that he has submitted a total of eleven written

applications. TR. 18-19, 49-50. Given that Mr. Cuevas' FCE was performed nearly a year before his § 22 Modification hearing, the Court finds that contact with only twenty employers is not demonstrative of a diligent job search. Likewise, nearly nine months passed between Mr. Sanders' February 5, 2002 letter identifying potential employment and the § 22 Modification hearing. When asked if he has done everything he could to obtain work, even Mr. Cuevas himself opined that he probably could have done more and put in more applications. TR. 52-53, 61.

In addition to the number of jobs he applied to, the Court also finds that the quality of Mr. Cuevas' job search was deficient. Mr. Cuevas testified that half of the employers on his list, CX-2, were called out of the blue, without knowing whether they were hiring or not. TR. 60. Mr. Cuevas also indicated that he would visit employers in person without knowing whether they were hiring or not. TR. 60. Although cold calls to employers may in some cases be commendable, the Court finds that Mr. Cuevas' use of cold calls, given his significant reliance on them, reflects disorganization and lack of forethought in his job search. Mr. Cuevas also testified that he looked up job openings at the employment office generally at least once every two weeks. TR. 51-53. For each visit to the employment office, Mr. Cuevas was allowed to examine the details of three openings of his choosing. TR. 51-52. According to Mr. Cuevas however, he did not find any openings for which he was qualified, except one position as a butcher. TR. 51-53. Even then, Mr. Cuevas did not pursue the butcher's position, explaining that he did not feel his back and shoulder problems would allow him to sit and slice meat all day. TR. 53. In addition, Mr. Cuevas checked but apparently did not pursue any leads from the classifieds, as his list of seventeen employers did not contain any openings from the classifieds. TR. 60. In light of the resources he supposedly utilized, Mr. Cuevas should have been able to locate and pursue leads with more potential. In the Court's view, a diligent claimant would have found at least some potential leads by way of the employment office listings and classified ads. The fact that he did not find any leads with potential, except the butcher's position that he did not pursue, supports a determination that Mr. Cuevas was not diligent in his job search.

Furthermore, of the seventeen employers that were independently contacted, Mr. Cuevas spoke to only ten. TR. 50; CX-2. He testified that the other seven employers were listed because his wife had called them on the phone to ask if they were hiring. TR. 51. Mr. Cuevas testified that he sat beside his wife while she made these calls and explained that his wife made the calls because he does not like to talk much. TR. 51. Mr. Cuevas also testified that his wife filled out some of his applications for him while he sat beside her. TR. 27. Given that Mr. Cuevas can read and write, the Court finds that his wife's involvement in calling employers and filling out applications was both unnecessary and uncharacteristic of an applicant with diligence and a willingness to work. TR. 27, 56. In the Court's opinion, his wife's involvement in such critical phases of the job search must have created to the potential employers a negative impression of Mr. Cuevas' competence and desire to be hired. In addition, Mr. Cuevas has not gotten a GED, despite the fact that Mr. Sanders

recommended he obtain one. TR. 29-30, 55-56; RX-2. Mr. Cuevas indicated that there was no particular reason why he has not obtained a GED. TR. 56. As is symptomatic of his job search generally, Mr. Cuevas' inaction and passiveness regarding his GED reflects a lack of diligence and a willingness to work.

Given the foregoing, the Court finds that Avondale has successfully demonstrated the existence of suitable alternative employment in this case. The earliest date on which Avondale established suitable alternative employment was February 5, 2002, the date of Mr. Sanders' first labor market survey. In our original decision, the Court determined that Mr. Cuevas' average weekly wage was \$429.02. See Cuevas v. Avondale Industries, Inc., Case No. 2000-LHC-638 (January 22, 2001, ALJ Mills); JX-1, p. 11. This finding is not contested on modification. Therefore, beginning February 5, 2002, Mr. Cuevas is entitled only to permanent partial disability compensation based on an average weekly wage of \$429.02 and reduced by a residual wage-earning capacity as determined below.

WAGE-EARNING CAPACITY

The determination of post-injury wage-earning capacity in cases of permanent partial disability is governed by §§ 8(c) and 8(h) of the Act, 33 U.S.C. §§ 908(c) and 908(h). La Faille v. Benefits Review Bd., 884 F.2d 54, 60, 22 BRBS 108, 118 (CRT)(2nd Cir. 1989). Because Claimant's injury is not of a kind specifically identified in the schedule set forth in §§ 8(c)(1)-(20), it falls under § 8(c)(21). 33 U.S.C. §§ 908(c)(1)-(21). Under § 8(c)(21), compensation is set at 66 2/3 percent of the difference between claimant's average weekly wages at the time of the injury and his post-injury wage-earning capacity, as determined pursuant to § 8(h) of the Act. Bethard v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 691, 693 (1980); 33 U.S.C. § 908(c)(21).

Section 8(h) provides in part that post-injury wage-earning capacity shall be determined by claimant's actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity. Bethard, 12 BRBS at 693; 33 U.S.C. § 908(h). However, if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the Court may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of the employee's injury, the degree of physical impairment, the employee's usual employment, and any other factors or circumstances which may affect the employee's capacity to earn wages in a disabled condition, including the effect of disability as it may naturally extend into the future. 33 U.S.C. § 908(h). Furthermore, §§ 8(c)(21) and 8(h) of the Act require that the wages earned in a post-injury job be adjusted to account for inflation in order to represent the wages that job paid at the time of the claimant's injury, insuring that wage-earning capacity is considered on an equal footing with the determination under § 10 of average weekly wage at the time of the injury. Richardson v. General Dynamics Corp., 19 BRBS 48, 49-50 (1986); Bethard, 12 BRBS at 695; La Faille, 884 F.2d at 61, 22 BRBS at

120. A court may average the hourly wages of jobs found to be suitable alternative employment in order to calculate wage-earning capacity. Avondale Industries v. Pulliam, 137 F.3d 326, 328, 32 BRBS 65, 67 (5th Cir. 1998).

In this case, the Swifty Serve cashier position was available for 24 to 38 hours per week and paid \$5.75 per hour in February 2002. TR. 34; RX-2, p. 1. Considering the Swifty Serve position at 31 hours per week, the average of 24 and 38 hours, the weekly wage is \$178.25. The Republic Parking position was available for 40 hours per week and paid \$6.00 per hour in February 2002, for a weekly wage of \$240.00. RX-2, p. 1. The Professional Security position was available for 40 hours per week at a rate of \$6.25 per hour in February 2002, for a weekly wage of \$250.00. RX-2, p. 2. The Copa Casino position was available for 40 hours per week⁴ at a rate of \$6.50 to \$7.50 per hour in October 2002. TR. 34-35; RX-2, p. 10. Considering this position at \$7.00 per hour, the average of \$6.50 and \$7.50 per hour, the weekly wage is \$280.00. The Munro Petroleum position was available for 36 hours per week at a rate of \$6.50 per hour in October 2002, for a weekly wage of \$234.00. TR. 35; RX-2, p. 10. The Imperial Palace position was available for 40 hours per week at a rate of \$7.50 per hour in October 2002, for a weekly rate of \$300.00. TR. 35; RX-2, p. 11.

These February 2002 and October 2002 wages must be adjusted downward to account for inflation since the time of Mr. Cuevas's work-related injuries. The Benefits Review Board has held that the percentage increase in the National Average Weekly Wage ("NAWW") for each year should be used to adjust a claimant's post-injury wages for inflation. Quan v. Marine Power & Equipment Co., 30 BRBS 124, 127-28 (1996); Richardson v. General Dynamics Corp., 23 BRBS 327, 330-31 (1990). The National Average Weekly Wage in December 1997, when Mr. Cuevas suffered his work-related injuries, was \$417.87. United States Department of Labor, Employment Standards Administration (April 24, 2003). The National Average Weekly Wage on February 5, 2002, the date the rates of the Swifty Serve, Republic Parking, and Professional Security positions were reported by Mr. Sanders, was \$483.04. Id. Adjusting the February 2002 wages with this in mind, the Court finds that the proper rates for the Swifty Serve, Republic Parking, and Professional Security positions for December 1997 are \$154.20, \$207.62, and \$216.27, respectively.⁵ The National Average Weekly Wage for October 4, 2002, the date the rates

⁴ Although Mr. Sanders identified both part-time and full-time openings, at 20 and 40 hour per week respectively, the Court will use the 40 hour opening to calculate this position's weekly wage. The Court finds that the 40 hour per week position constitutes suitable alternative employment for Mr. Cuevas, given Mr. Cuevas does not have any restrictions against full-time work.

⁵ The Court arrived at this figure by calculating the proportions: (1) $x/\$417.87 = \$178.25/\$483.04$, for the Swifty Serve position; (2) $x/\$417.87 = \$240.00/\$483.04$, for the Republic Parking position; and (3) $x/\$417.87 = \$250.00/\$483.04$, for the Professional Security position.

of the Copa Casino, Munro Petroleum, and Imperial Palace positions were reported by Mr. Sanders, was \$498.27. Id. Adjusting the October 4, 2002 wages, the Court finds that the proper rates for the Copa Casino, Munro Petroleum, and Imperial Palace positions for December 1997 are \$234.82, \$196.24, and \$251.59, respectively.⁶ Taking the average of the December 1997 wages for these six positions, the Court finds Mr. Cuevas's post-injury wage-earning capacity to be \$210.12 per week.

Accordingly,

The Court's original Decision and Order, entered on January 22, 2001, is modified as follows:

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

- (1) Employer/Carrier shall pay to Claimant compensation for permanent partial disability benefits beginning February 5, 2002 and continuing, based on an average weekly wage of \$429.02 and reduced by his residual wage-earning capacity of \$210.12.
- (2) Employer/Carrier shall pay to Claimant interest on any unpaid compensation benefits. The rate of interest shall be calculated at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average auction price for the auction of 52 week United States Treasury bills as of the date of this decision and order is filed with the District Director. See 28 U.S.C. §1961.
- (3) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant.

⁶ The Court arrived at this figure by calculating the proportions: (1) $x/\$417.87 = \$280.00/\$498.27$, for the Copa Casino position; (2) $x/\$417.87 = \$234.00/\$498.27$, for the Munro Petroleum position; and (3) $x/\$417.87 = \$300.00/\$498.27$, for the Imperial Palace position.

- (4) Claimant's counsel shall have thirty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have thirty (30) days from receipt of the fee petition in which to file a response.

So ORDERED.

A

RICHARD D. MILLS
Administrative Law Judge